No. 881

FEB 23 1945

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In The
United States Supreme Court

* * * *

GEORGE HARRIS AND ELLIS McDANIEL,
PETITIONERS

VERSUS

L. C. HAMMOND, OPERATING AND DOING BUSINESS AS L. C. HAMMOND AND COMPANY,
RESPONDENT

* * * *

BRIEF OF RESPONDENT

* * * *

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APPLICATION TO THE SUPREME COURT OF THE UNITED STATES

* * * *

FOR A WRIT OF CERTIORARI

* * * *

FROM THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS AFFIRMING THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

* * * *

GEORGE HARRIS AND ELLIS McDANIEL

PETITIONERS

VERSUS

L. C. HAMMOND, OPERATING AND DOING BUSINESS AS L. C. HAMMOND AND COMPANY,

RESPONDENT

* * * *

STATEMENT OPPOSING GRANTING OF THE WRIT OF CERTIORARI

* * * *

L. C. Hammond, operating and doing business as L. C. Hammond and Company, files this his statement in opposition to petitioners' application for writ of

certiorari, and respectfully submits that the writ should not be granted for the following reasons:

(a) Because the evidence showed that the Respondent conducts and operates a retail establishment, and Petitioning employees were engaged in a retail establishment.

(b) Because, the evidence showed that the greater part of Respondent's selling was in intrastate commerce.

(c) Because, if Respondent, who neither manufactures nor produces goods for commerce should be held to be a wholesaler, the Petitioners would not be entitled to invoke the Act for all of the services rendered, but only for the services rendered by them that had some immediate relationship to interstate commerce.

(d) Because, the burden of proving Respondent a wholesaler, and the burden of proving the number of hours Petitioners were engaged in interstate commerce, rests upon Petitioners.

* * * *

BRIEF OF CURRY AND CURRY OPPOSING THE GRANT OF THE WRIT OF CERTIORARI

PART I.

STATEMENT OF THE CASE

The action in this case was brought by three former

employees of Respondent, George Harris, Ellis McDaniel, and J. H. McKey, but J. H. McKey is not a party to this appeal.

Augusta, Georgia is a city on the state line between Georgia and South Carolina. Aiken, Edgefield, and McCormick Counties in South Carolina are just across the river from Augusta. (See testimony of J. H. McKey on page 13 of the brief of evidence.)

Since 1931 the Appellee has operated a grocery and feed business in the city of Augusta. His place of business is located on the first or street level floor of a two-story building on the main business street in the retail district of the city. The second floor is given over to apartments where people dwell. The store is 30 or 40 feet wide and between 140 and 150 feet long. The front portion of it nearest the street and extending 35 or 40 feet towards the rear, contains shelves, counters, display cases and racks. Regular cash tickets are used for the various customers and as each customer makes his purchase, it is rung up on a cash register. The store has large plate glass windows, in front of which, on the sidewalk, goods are displayed in the usual manner of a retail grocery store. A partition, without a door, separates the front end from the rear. This partition was already in the building when Appellee rented the premises. The rear compartment is used as a warehouse and storage room principally for grain, hay and other foodstuffs of that type. The majority of Appellee's business is feeds. Most of it is sold to dairymen and poultrymen, weekly trade. Appellee does some wholesale business. Solicits one day out of a week. Only uses that one day to help the buying. He does not run a wholesale grocery store, never has.

They just buy in little larger quantities. Appellee came from South Carolina. His customers are in Georgia and in McCormick, Edgefield and Aiken County, South Carolina. These counties are in the Augusta business area.

No manufacturing, production, or processing of goods is undertaken by appellee. He does not even mix the feed which he sells.

During the years in controversy, the gross sales of Appellee were between a minimum of $90,000.00 and a maximum of $105,000.00 per year. "It would be impossible for a wholesale grocery to exist on a $105,000.00 business a year." (See brief of evidence page 25.)

Less 20% of Appellee's gross sales representing retail sales.

Some goods are sold and delivered to customers in South Carolina, but these sales would not exceed 15% or 20% of the gross sales.

According to statements made to credit agencies, Appellee's stock of merchandise varied from $15,000.00 to $18,000.00. His accounts receivable ran around $4,500.00.

Appellee operates only one truck. One day each business week this truck makes deliveries in the three South Carolina counties lying just across the river from Augusta. The truck driver and his helper, when going into South Carolina, leave the store around ten o'clock in the morning and return by three-thirty or four o'clock in the afternoon. "xxxThey would deliver

goods to not over 30 customers, probably less." These sales in South Carolina do not exceed 15% or 20% of Appellee's gross sales. No goods are shipped out by railroad.

All goods purchased by Appellee come to rest in his warehouse or storage room. They are never ordered on preexisting contracts or understandings with customers.

Occasionally Appellee and several other merchants together purchase a car of merchandise, and when the car arrives, the merchandise is distributed among the purchasers.

Appellee serves the public and sells indiscriminately to any one wishing to buy and who calls at his store, on the principle of first come, first served.

Between 100 and 150 customers are served at retail over the counter daily during the week, and on Saturdays about 500 customers are served in the same way.

A recent examination of Appellee's books show that he only has 45 customers who buy non-retail.

Appellee's records are in such shape that he can identify every sale made in South Carolina. (See Brief of Evidence, page 29).

In 1939 or 1940 an inspector from the Department of Labor, Wage and Hour Division, examined Appellee's records and inspected his store. He found the percentage of non-retail business in dollars at that time to be less than 20% of the whole and informed the Appellee that his business was not subject to the Fair Labor

Standards Act, being exempt under section 13(a) (2), (29 U.S.C. Sect. 213(a) (21) as a retail establishment, the greater part of whose selling was in intrastate commerce. A second inspector coming in later, confirmed the earlier inspector upon finding the so-called wholesale sales had not increased.

* * * *

PART II

OPINION OF JUDGE LOVETT

Lovett, J.

By consent of the parties this case was heard by the court as trior of the facts.

My findings and conclusions follow:

FACTS

The suit is by three former employees of defendant to recover unpaid minimum wages, overtime compensation, liquidated damages, attorney's fees and costs under the Fair Labor Standards Act of 1938. 29 U.S.C, Sec. 201, et seq.

Plaintiff McKey, who was paid $20 a week for his services, sues for overtime compensation, etc., from October 23, 1938 to December 24, 1939, alleging he worked 75 hours each week during that period. The plaintiff Harris, paid $11 per week for his services, alleges he worked 76 hours per week from October 23, 1938 to June 15, 1941. He sues for unpaid minimum wages, overtime, etc. Plaintiff McDaniel, paid $11 per week from Octob-

er 23, 1938 to April 15, 1941, $15 per week from April 15, 1941 to March 25, 1942 and $20 per week from March 25, 1942 to August 1, 1942, sues for unpaid minimum wages, overtime compensation, etc.

The question is whether these employees are within the coverage of sections 6 and 7 of the Act.

Since 1931 the defendant has operated a grocery and feed business in Augusta, Georgia, a city on the state line between Georgia and South Carolina. There is a dispute between the parties as to whether he conducted a retail establishment or was a wholesale grocer. He sold and delivered some goods to customers in South Carolina, where he lived before he entered business in Augusta, Georgia.

The defendant's place of business is located on the first, or street level, floor of a 2-story brick building on the main business street in the retail district of Augusta. The second floor is given over to apartments where people dwell. The store is 30 or 40 feet wide and between 140 and 150 feet long. The front portion of it nearest the street, and extending 35 or 40 feet towards the rear, contains shelves, counters, display cases and racks, a cash register and the usual equipment found in a retail grocery store. Photographs in evidence disclose that it has large plate glass windows, in front of which on the sidewalk and behind which goods are displayed in the usual manner of a retail grocery store. A partition without a door, already in the building when the defendant rented

the premises, separates the front end from the rear. The rear compartment is used as a warehouse and storage room, principally for grain, hay and other feed stuffs of that type. Entrance to the rear compartment is at or near the rear of the building. One entering the front door of the store from the street has a view of what would appear to be a retail grocery store.

No manufacturing, production or processing of goods for commerce is undertaken or done by the defendant. He does not even mix the feed which he sells.

During the years in controversy the gross sales of the defendant were between a minimum of $90,00 and a maximum of $105,00 per year. Less than 20% of the gross sales represent non-retail sales, or what the plaintiffs characterize as sales at wholesale. Not exceeding 15% or 20% represent sales of goods delivered to customers in South Carolina. According to statements made to credit agencies his stock of merchandise varied from $15,000 to $18,000. They reported him as both a retail and a wholesale grocer. His accounts receivable ran around $4,000. Among the principal customers of the defendant are dairymen, poultrymen and farmers owning cattle and live stock and who purchase feed stuffs in larger quantities than a retail grocery store ordinarily would sell. Some of these customers are in Georgia; some in South Carolina. Some South Carolina customers call at defendant's store and purchase and take delivery there, using their own trucks for the purpose. However, defendant operates one truck of his

own—and only one. One day each business week he makes deliveries in South Carolina with this truck. No goods are shipped out by railroad. On the side of defendant's one truck is painted defendant's name, followed by the words "Wholesale Grocer". He also used stationery and invoices on which the words "wholesale grocer" appeared. Occasionally he and others in the retail grocery business pooled their purchases and bought in quantities, carload lots, using his name to do so, and on arrival they parceled out the goods among themselves. All goods purchased came to rest in the warehouse portion of the store. They were not ordered on pre-existing contracts or understandings with customers in or out of the state, with the exception noted as to the pooling of purchases, though some of those from whom he bought were located and shipped the goods to him from without the state. On arrival he had no way of knowing whether the commodities he bought would be sold to any particular customer anywhere. He served the public and sold indiscriminately to any one willing to buy and who called at his store on the principle of first come first served. His business licenses from the state sometimes described him as a wholesale grocer and at other times simply as a grocer. In the City and telephone directories he was classified among the wholesale grocers. On the plate glass windows of his store appeared the words "L. C. Hammond & Company, Groceries and Feeds." There was also a sign extending over the sidewalk reading the same way. Between 100 and 150 customers daily during the week and on Saturdays about 500, admittedly buying at retail in small quantities, were

served over the counter in the front end of the store. His customers in South Carolina at no time exceeded 40 or 50 people. Over a period of years, counting both old customers to whom he no longer sold and the new and current ones, the number was larger.

An agent of Appellee spent one day each week soliciting orders and making collections in South Carolina, and for the balance of the week he worked in the store either in the warehouse space or in what for convenience, I shall call the retail department. He was not employed originally as a salesman to travel; he took over that work when the defendant himself had to give it up on account of ill health. Harris, drove the truck for one day each week into South Carolina making deliveries of goods sold to customers there, and when not so engaged hauled goods in the truck from the railroad delivery tracks to the store and unloaded and handled goods in the warehouse department (some of which came from without the state and carried packages from the retail department to the street curb to parked automobiles of customers. Mcdaniel, assisted the truck driver in the performance of his work. The truck driver and his helper when going into South Carolina would leave the store around ten o'clock in the morning and return by 3:30 or 4:00 o'clock in the afternoon, one day each week, usually on Wednesday, and en route to South Carolina would make deliveries in the State of Georgia if the business so required.

In 1939 or 1940 an inspector from the department of labor, wage and hour division, examined

the defendant's records and inspected his store. He found the percentage of non-retail, or wholesale, business in dollars at that time less than20% of the whole, and informed the defendant his business was not subject to the Fair Labor Standards Act, being exempt under section 13(a) (2), (29 U.S.C. Sec. 213(a) (2) as a retail establishment the greater part of whose selling was in intrastate commerce. A second inspector, coming in later, confirmed the earlier inspector upon finding the so-called wholesale sales had not increased.

DISCUSSION

There are two questions for decision. The first is are these employees engaged in a retail establishment, the greater part of whose selling is in intrastate commerce, with respect to whom by section 13(a) (2) of the Act sections 6 and 7 are made inapplicable. Secondly if they are not, if the defendant is a wholesaler, are these employees covered by the Act in all of their activities; were they wholly "in commerce" and entitled to invoke the Act for all of the services they rendered, or only where the services had some immediate relationship to interstate commerce. Collaterally there is the question of where the burden of proof rests.

It should be noticed we are dealing here with one who neither manufactures nor produces goods for commerce. A producer under the Act is treated very differently from one who merely sells either at wholesale or retail. As to the manufacturer or producer Congress made no distinction as to the volume or amount or shipments in the com-

merce or of production for commerce by any particular shipper or producer, provided it was substantial. It recognized that in present day industry competition by small concerns may effect the whole, and that the total effect of the competition of many small producers may be great. U.S. v. Darby, 312 U.S. 100, 123; Davis v. Goodman Lbr. Co., 133 F. 2d. 52, 53; Walling v. Peoples Packing Co., 132 F.2d 237(6); Ling v. Currier, 50 F. Sup.—: Samuels v. Houston, 46 F. Supp. 364, 366. It is different as to a retail establishment. By the express terms of the Act Congress said the provisions of sections 6 and 7 relating to minimum wages and overtime compensation should not apply with respect to "(2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce". Section 13(a) (2), 29 U.S.C. Sec. 213(a) (2). As to wholesalers, all phases of their business selling intrastate are not necessarily covered by the Act because the purchases are made interstate. Walling v. Jacksonville Paper Co., 317 U.S. 564; 570-71; Higgins v. Carr Brothers Co., 317 U.S.; Reuter v. Walling (5 Cir.).F.—— 2d——, decided July 22, 1943. "We can not be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states. Congress did not exercise in this Act the full scope of the commerce power, as was stated in Kirschbaum v. Walling, 316 U.S. 517, 522-23. . There is, however, no indication in the legislative history that but for the exemption of retailers it was thought that all movements of goods from manufacturers to wholesalers and on to retailers would be 'in com-

merce' within the meaning of the Act, where the wholesalers and retailers were in the same state. It is quite clear that the exemption in Sec. 13(a) (2) was added to eliminate those retailers located near the state line and making some interstate sales . . . And the exemption for retailers contained in Sec. 13(a) (1) was to allay the fears of those who felt that a retailer purchasing goods from without the state might otherwise be included . . .Hence we can not conclude that all phases of a wholesale business selling intrastate are covered by the Act solely because it makes its purchases interstate." Jacksonville Paper Company case, supra.

Therefore, we first turn to a consideration of defendant's activities.

Was he in any true sense a wholesaler doing an interstate business.

To establish that he was, the plaintiffs say he solicited retailers in South Carolina to buy goods from him one day each week; that he held himself out to some of his customers and to those from whom he bought as a wholesale grocer; his truck had those words painted on its sides; he was so listed in the telephone and city directories; his stationery and invoices so claimed—and that these facts are undisputed. On the otherhand, when we consider the kind of store he operated its appearance, customers, etc., the volume of his business, the amount of his inventory, the accounts receivable, etc., together with the fact that his quantity sales were less than 20% of his total sales, it seems

reasonably clear to me that in no genuine sense was he a wholesaler. Certainly his total quantity sales, and particularly his sales outside of the state, could not have kept him in business very long unless he had his sales at retail to add to them. The evidence is silent as to prices charged in cases where sales were made in quantity or at wholesale. It is fair to assume that some discount was allowed, but it is also conceivable that the customers in South Carolina may have been willing to pay Augusta retail prices if deliveries were made to their doors without cost to them. The defendant undoubtedly posed as a wholesaler in some relationships and for some purposes. I am inclined to think this he did in order to buy more cheaply rather than to sell to those who sell again, which is the ordinary test for determining if one is a wholesaler. It is the business activities, not what he calls himself, that should control. See White Motor Co. v. Littleton, 124 F. 2d 92; Prescription House, Inc., v. Anderson, 42 F. Supp. 874; Duncan v. Montgomery Ward & Co. 42 F. Supp. 879; Snavely v. Shugart, 45 F. Supp. 722; Zehring vs. Brown Materials, 48 F. Supp. 740. When it is remembered that all of the quantity sales of defendant in South Carolina were within a few miles of the city of Augusta, Georgia, within what might be called its retail trade territory, more or less in the same section from which he originally came and where his personal friends doubtless resided, that in the beginning and before the plaintiff McKey was employed the defendant himself personally drove his automobile one day each week into that trade territory and saw his customers in person, that he did not employ the

plaintiff McKey in the beginning as a salesman or solicitor and only because of ill health of the defendant himself did McKey take over that work, that the volume of such business was relatively small in dollar values, it seems clear to me that the quantity sales interstate were merely incidental to defendant's intrastate business, which intrastate business was predominently the thing out of which he made his living.

Were the plaintiffs engaged in a retail establishment? If so, they can not invoke the Act, for clearly by the dependable evidence it was shown the greater part of the selling by the establishment was intrastate.

If we look to the Interpretative Bulletins of the Administrator set up by the Act (Bulletin No. 6, June 1941) as an aid to the determination, which we may do not as conclusive but as having persuasive value because it is a contemporaneous construction by an officer charged with enforcement of the Act (U.S. v. American Trucking Ass'n. 310 U.S. 534, 540; Walling v. American Stores, 133 F. 2d 840, 843), we find the physical appearance and equipment of defendant's store as well as his manner of selling over the counter squarely within his description of a retail establishment. See Pars. 9 to 14.

The volume of sales retail and non-retail also bring him within the exemption according to the Administrator's bulletin. It is there said (par. 18): "For purposes of enforcement the Administrator will ordinarily consider the non-retail selling of an establishment to be substantial if the gross

receipts from such selling constitute more than one quarter (25 per cent) of the total gross receipts of the establishment". Feed establishments selling in large quantities and at a discount from the regular retail price are considered in the Bulletin (pars. 63 and 64). The Administrator applies the same 25% test to determine if their non-retail sales are substantial. He says "In some cases, however, an establishment sells feed, hay, fertilizer, etc. in large quantities and at a discount from the regular discount price. For example, feed is sold to feed **stores,** large commercial poultry and dairy farmers, urban users of horse feeds, non-farming feeding and fattening stations. In the ordinary case these sales are not retail sales, and if such sales constitute a substantial portion of the selling . . it may not be considered a retail establishment under the exemption. See par. 18 (the 25% par.) for a discussion of 'substantial'." (emphasis mine).

Some of our courts have reached the same conclusion where the non-retail or wholesale sales were casual, incidental or unsubstantial only. Prescription House v. Anderson, Duncan v. Montgomery Ward & Co., and White Motor Co. v. Littleton, supra. See also Stucker v. Roselle, 37 F. Supp. 864, 865 (8, 9), 867; Moses v. McKesson & Robbins, 43 F. Supp. 528 (2) 529. The only reported case where a different view was entertained seems to be Petway v. Dobson, 43 F. Supp. 277, by District Judge Davies of the Middle District of Tennessee. Some of the facts are strikingly like the case at bar. But there are also differences. Unlike here it was admitted that the larger pro-

portion of defendants' business was in interstate commerce, and twenty five percent of the total sales made were wholesale. Here the ratio is much lower.

The plaintiffs were engaged in a retail establishment the greater part of whose selling was in intrastate commerce.

This opinion might well end here. But there are other aspects of the case which for future guidance of the parties properly may be discussed briefly. One of them relates to the over-time compensation claimed by the truck driver and his helper while engaged in hauling goods from the railroad to defendant's warehouse, some of the goods coming from outside of the state. While so engaged for a substantial portion of their time, if the defendant had been a wholesaler, they would have been engaged in interstate commerce and within the coverage of the minimum wage provision of the Act but without the overtime provisions. Jax Beer Co. v. Redfern, 124 F. 2d 172, 174; Walling v. Goldblatt Bros., 128 F. 2d 778 (6), 782; Southland Gasoline Co. v. Bagley,——U. S. decided May 3, 1943; Walling v. Silver Bros Co. (1st Cir.)——F. 2d——, decided May 21, 1943; Reuter v. Walling, supra. How much of their time, however, was given to such hauling has not been shown. Where an employee works both interstate and intrastate he must point out what part of his work is given to each. Supercold Southwest Co. v. McBride, 124 F. 2d 90 (5), 92; Snavely v. Shugart, supra; Samuels v. Houston, 46 F. Supp. 364, 367; Bracey v. Luray, 49 F. Supp.

821 (9). On the other hand, if the defendant had been a wholesaler, and these employees during a given work week interchangeably engaged in work in a department involving only intrastate business and in another involving interstate commerce (even if it could be found here the business was sufficiently departmentalized as to segregate the two departments, which I think has not been shown) the employer would have been required to pay the wages prescribed by the Fair Labor Standards Act for the entire time worked, including time spent in the department involving intrastate business alone. Fleming v. Knox, 42 F. Supp. 948; Ling v. Currier Lbr. Co., supra.

CONCLUSIONS

1. The court has jurisdiction of the parties and the subject matter under section 16(b) of the Fair Labor Standards Act of 1938, 29 U.S.C. Section 216 (b).

2. By the express terms of section 13(a) (2) sections 6 and 7 of the Act are not applicable to the plaintiffs.

3. Judgement shall be for defendant. Let it be presented on notice.

This August 11th, 1943.

Archibald B. Lovett,

United States Judge.

PART III

DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, BEFORE SIBLEY, HUTCHESON, AND McCORD, CIRCUIT JUDGES.

McCORD, Circuit Judge: This suit is by three former employees of the defendant to recover unpaid minimum wages, overtime compensation, liquidated damages, attorneys' fees and cost under the Fair Labor Standards Act of 1938. 29 U. S. C. Sec. 201 et seq.

The evidence is set out at length in a well considered opinion by the trial judge. **Harris v. Hammond,** 51 Fed. Supp. 91.

The question for decesion is whether these employees are within the coverage of Sections 6 and 7 of the Act: "The provisions of Sections 6 and 7 shall not apply with respect to (1) any employees employed in a **bona fide** * * * local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by the regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." 29 U. S. C. A. 213 (a) (1) and (2).

L. C. Hammond was neither a manufacturer nor did he produce goods for commerce. Since the year 1931 he had operated a grocery and feed business at Augusta, Georgia, which is located on the State line between Georgia and South Carolina. While he sold feed to dairy customers, the majority of his sales was made to customers who entered his store. He had a limited number of customers in South Carolina, but a very large

majority of his customers numbering between 100 and 150 each day and about 500 on Saturdays, entered his store and bought groceries over the counter. He owned and operated only one delivery truck and this truck was used only a part of one day each week by two employees in delivering groceries in South Carolina.

The evidence is without dipute that the gross sales of the Hammond business for several years past had been between $90,000 and $105,000 per year; that no wholesale grocery business could survive on such yearly sales. Moreover, his stock of goods varied from $15,000 to $18,000, and the accounts receivable ran around $4,000; and his grocery store was like other retail grocery stores in that section.

In the year 1939 or 1940 an Inspector from the Department of Labor, Wage and Hour Division, examined the Hammond records and inspected his store and found the percentage of non-retail or wholesale business in dollars, at that time, less than 20% percent of the whole, and informed the defendant that his business was not subject to the Fair Labor Standards Act, being exempt as a retail establishment "the greater part of whose selling was intrastate commerce." A second inspector coming in later, confirmed the earlier inspector upon finding the so-called wholesale sales had not increased.

The law is now well settled that those engaged in and employed in such establishments, which sell goods or merchandise the greater part of which is in intrastate commerce, do not come within the purview of the Fair Labor Standards Act. **White Motor Co v. Littleton,** 124 F. (2d) 92; **Super-cold Southwest Co. v. McBride,**

124 F. (2d) 90. Moreover, if the plaintiffs here had performed any service which was interstate they have signally failed to show to what extent this service was performed. **Walling v.Goldblat Bros.,** 128 F. (2d) 778; **Jax Beer Company v. Redfern,** 124 F. (2d) 172.

There is abundant evidence to be found in the record which supports the findings and decree of the court trying the case without the intervention of jury, and the judgment is AFFIRMED.

* * * *

PART IV

STATUTE THAT EXEMPTS PETITIONERS FROM THE PROVISIONS OF THE ACT

> "The provisions of sections 6 and 7 shall not apply with respect to***any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce,***"
>
> Section 13(a) (2) of the Fair Labor Standards Act of 1938.

* * * *

PART V

DISCUSSION

THAT HE CONDUCTS AND OPERATES A RETAIL ESTABLISHMENT, AND APPELLANT EMPLOYEES WERE ENGAGED IN A RETAIL ESTABLISHMENT.

RETAIL ESTABLISHMENT CHARACTERISTICS

In an Interpretative Bulletin issued December 1938, Revised June 1941, and designated Interpretative Bulletin No. 6, the Administrator undertakes to set out the physical characteristics of a retail establishment, as follows:

(a) Sales clerks are employed to assist customers in making their purchases.

(b) Retail establishments usually have counters, cash registers to ring up sales, shelves for the display and convenient arrangement of merchandise.

(c) Display windows to attract the patronage of the general public.

(d) They maintain a stock of merchandise on hand and normally make sales over the counter from such stock.

(e) They do not have manufacturing equipment or other machinery normally found in factories.

(f) It is characterized by numerous small sales.

(g) It sells merchandise in small quantities and at prices which are higher than the prices involved in sales by wholesalers or jobbers.

(h) It is patronized regularly by the general consuming public.

In the same Bulletin, the Administrator specifically recognizes Appellee's store as a retail estabblishment, when, in paragraph 63 of said bulletin, he says:

> "We have received many inquiries regarding the applicability of section 13(a) (2) to small country feed stores. These establishments, which are engaged in the distribution of feed, hay, fertilizer and similar products,—frequently also sell a variety of other products such as flour, coal, hardware, building supplies, etc. Sales made to the farmers in the vicinity in small quantities for their own use and at regular retail prices. In our opinion, such sales are properly to be considered as retail sales."

In the case of White Motor Company v. Littleton, 124 Federal (2nd) 92, at h.n. 1, the Court defines the word "retail" as follows:—

> "The word 'retail' in common and ordinary acceptation, when used in sales parlance, means a sale in small quantity or direct to the customer, as distinguished from the word 'wholesale' meaning a sale in large quantity to one who intends to resell, and the character of the sale is not altered by the use to which the consumer may put the purchased commodity. (See White Motor Co. vs. Littleton, 124 Fed. (2d.) 92.)"

Mr. McKey, one of the original plaintiffs, testified on this subject, generally as follows:

That there are show windows on either side of the front door; that there are counters and shelves in the store; that they have a cash register; that as the cash customers are making their purchase they are rung up; that this is done every day; that he waited on the retail trade in the store every day in the week except one (see page 13 of the transcript of evidence); that just in front of the store are shelves, and a place for display;

that they sell goods off the shelves, like A & P and Rogers; that anybody that wants to can go there and buy groceries, sardines and other groceries at retail. (See page 16 of the transcript of evidence).

Mr. Harbeson, a witness introduced by Appellants, on cross examination, testified as follows: That his place of business is just three or four doors above Mr. Hammond's; that Mr. Hammond sells at retail; that he sees customers in the Hammond store every day; that Mr. Hammond conducts a regular retail business, just like his. (See page 29, transcript of evidence).

Mr. Hammond testified generally as follows:

That he conducts and operates a grocery and feed business; that the majority of his business is feeds; that he sells most of it to dairymen and poultrymen; that he does a small amount of wholesale business; that he does not run a wholesale store; that he bought wholesale from merchants in Augusta; that he has counters, shelves, a cash register; that they ring up cash sales; that on the run of a day, through the week, his retail customers would average 150; that on Saturdays they would average 500; that he has not more than 35 wholesale customers on his books; that he has no warehouse, just a store that fronts on Broad Street, 30 or 40 feet on Broad and probably 140 or 150 feet deep; that it is a one story store; that he operates one truck; that in 1939, 1940, 1941, his busines would run around $90,000.00 a year; that one year his business ran as high as $105,000.00; that it would be impossible for a wholesale grocer to exist on $105,000.00 a year's business. (See transcript of evidence from page 32 to 43.)

Mr. F. B. Bailey testified generally that he made a

recent examination of the books of the company and that the company had only 45 wholesale customers: (See page 45 transcript of evidence); that according to the register it shows an average of from 100 to 150 retail sales a day except Saturdays when it shows 500. (See transcript of evidence page 46).

GROSS RECEIPT TEST FOR DETERMINING WHETHER AN ESTABLISHMENT IS WHOLESALE OR RETAIL.

"The foregoing discussion indicates the principal attributes of a retail establishment for purposes of section 13(a) (2). Minor discrepancies, of course, will not defeat the exemptions. Major variations from the patterns, however, do indicate that the exemption is inapplicable. Thus for example an establishment which makes some non-retail sales nevertheless would be considered a retail establishment if the gross receipts from nonretail sales are not substantial in relation to the total gross receipts of the establishment. For purposes of enforcement the administrator will ordinarily consider the nonretail selling of an establishment to be substantial if the gross receipts from such selling constitutes more than one-quarter (25 per cent) of the total gross receipts of the establishment."

> Wage and Hour Interpretative Bulletin No. 6, section 8.

The decision of many of our courts have followed the interpretation of the Administrator in this regard, and among these, are the following:—

Whetson v. Wexler, Chancery Court of Tennessee, Reported 3 Labor Cases 60, 283; Russo v. Fisher, Muni-

cipal Court of Pa., Reported 4 Labor Cases 60, 502; Soleim v. Tuverson et al., (Wis. Circuit Court, Douglas Cty; Earl B. Stucker v. Tony F. Roselle, United States District Court, District of Kentucky, 37 Fed. Supp. 864; Walling v. Wieman Co., 52 Fed. Supp. 131; Bynum v. Firestone Tire and Rubber Co. (Tenn. Ct. of App., W. D.)

We are not unmindful of the fact that courts are not bound by the interpretations placed upon an Act by an Administrator, but we do submit that the interpretation here made is a reasonable one and that the courts might well make the same interpretation.

"I am kookkeeper for L. C. Hammond and Company. I was in 1938 and have been for 12 years. The Wage and Hour people came to inspect the books. He stayed there about two days. He made an average of the retail and wholesale sales and said the percentage of wholesale was slightly under 20,% yes, sir, he came in since then and said the wholesale business had not increased." (See testimony of F. P. Bailey, page 27 brief of evidence).

The only effort made to impeach the 20% wholesale testimony was given by one of the original plaintiffs in the case, Mr. J. H. McKey, who testified generally;— that Appellee was a wholesale merchant; that he made some retail sales every day in the week; that they were always bigger on Saturdays; that the sales were made particularly to farmers living in South Carolina, Appellee's home state, where some of his relatives are; that he thought the amount of retail sales to the farmers would not run over 25%; that the amount of retail business done for the South Carolina farmers would be

about 10% of his total business and that 90% was wholesale.

"The Court: May I ask, how do you know that? A. I could not say exactly—The Court: Let me understand you. Did you have access to their

books and records: Why are you saying that; do you really know whether they sold $100.00 worth a month? A. No, sir. The Court: I confess, Mr. Chance, you are not making a very impressive witness of him, about sales. He does not seem to know anything about it except what he did himself. I do not see at this time how this evidence will benefit me much."

"Witness J. H. McKey:—I would not know enough to give you a correct figure and I have given you my estimate, this retail business was mostly to farmers in South Carolina. It was a kinder supply business to customers—a barrel of flour, side of meat or tub of lard. Some of it would be individual and some for their hands."

* * * *

THAT THE GREATER PART OF HIS SELLING WAS IN INTRASTATE COMMERCE.

The phrase, "the greater part of whose selling is in intrastate commerce," has been interpreted by the administrator to mean that more than 50 per cent of the sales be in intrastate commerce.

See Wage and Hour First Annual Report. 1939, page 21.

On pages 50 and 51 of the transcript of evidence and while Mr. F. B. Bailey, the bookkeeper, was on the stand testifying for the defendant, the Court asked this question:

"Call it an average of $100,000.00 for 1939, 1940, 1941, and 1942, listen carefully. Lumping your wholesale and retail sales together, calling it all one business and counting deliveries at your store to South Carolina customers in the same fashion as Georgia residents, but putting on this side deliveries you made in South Carolina—I understand all of that was by truck—how much of the $100,000.00 annual sales would you say represented sales not only direct to people in South Carolina but goods you delivered there by truck; how much of that $100,000.00 would you say represented that kind of business?"

Mr. Bailey answered as follows:

"That would be purely an estimate, but it would be I would say 15 or 20%. Not over that."

It will thus be seen that the employer conducts and operates a retail establishment and that not over 15% or 20% of his sales are in interstate commerce, therefore, the greater part of his selling is in intrastate commerce and his establishment is exempt from the provisions of the Fair Labor Standards Act.

Our own Circuit Court of Appeals has construed this statute with reference to the greater part of the selling or servicing being in intrastate commerce, and in the case of White Motor Company v. Marion C. Littleton et al., decided December 12, 1941, and reported in 124

Federal (2d), page 92, the Court, at head note No. 3, said:

> "Where employer sold products manufactured elsewhere, serviced and performed specified changes in the products and conducted repair and reconditioning department, and over 70 per cent of employer's sales were made direct to consumers, and although approximately 80 per cent of servicing performed was interstate over 90 per cent of selling was intrastate, and evidence indicated that servicing was more or less supplementary to sales and of business, employer was within exemption provided by Fair Labor Standards Act in favor of a "retail" or "service establishment", the greater part of whose selling or servicing is in "intrastate commerce" regardless of whether the phrase "selling or servicing" was a conjunctive or disjunctive phrase. Fair Labor Standards Act 1938, Section 1 et seq., and Sections 6, 13(a) (2), 16(b), 29 U.S.C.A. Section 201 et seq., and Sections 206, 213(a) (2), 216 (b)."

In the case of Super-Cold Southwest Co. v. McBride, another case from the Circuit Court of Appeals for the Fifth Circuit, decided January 15, 1942, and reported in 124 Federal (2d) page 90, the Court at head note No. 2, said:

> "A retail dealer, the greater part of whose selling is in intrastate commerce, is exempt from minimum wage and maximum hour provisions of Fair Labor Standards Act, notwithstanding that dealer's sales are made to commercial rather than to private users. Fair Labor Standards Act of 1938,

Sections 13(a) (2), 16, 29 U.S.C.A. Sections 213 (a) (2), 216."

In the case of Stucker v. Roselle, U.S. District Court, W. D. Kentucky, decided February 25, 1941, and reported in 37 Federal Supplement, page 864, the court, at head notes No. 8 and No. 9, said:

8. "One engaged in hat cleaning and reblocking conducted a "service establishment" within terms of Fair Labor Standards Act, and hence was exempted from minimum wage requirement where approximately 75 per cent of his business was intrastate business. Fair Labor Standards Act of 1938, Sections 6, 7, 13, 29 U.S.C.A. Sections 206, 207, 213."

9. "In ordinary language, the "greater part" means more than 50 per cent of the whole, where two parts only are being considered, and hence where 75 per cent of employer's business was in intrastate commerce, such business was the "greater part" of the whole so as to exempt employer from minimum wage requirements of Fair Labor Standards Act, though substantial portion of his business was interstate. Fair Labor Standards Act of 1938, Sections 6, 7, 13, 29 U.S.C.A. Sections 206, 207, 213."

In the case of Keith Ellinger v. The Goodyear Tire and Rubber Company, U. S. District Court, Northern District of Iowa, Western Division, decided June 6, 1941, and reported in Commerce Clearing House Labor Cases, page 60, 534, the court had under consideration an employee engaged in a gasoline service station

whose greater volume of income was derived from local and intrastate business and the court said:

> "As a conclusion of law the Court finds and declares that the defendant, because of the character, classification and volume of its business as found by the Court, was exempt from the provisions of Section 6 and 7 of the Act relative to maximum hours of actual service and minimum wage provisions."

In the case of Mansell Dotson v. A. K. Stowers, U. S. District Court, Southern District of West Virginia, Charleston Division, decided April 15, 1941, reported in Commerce Clearing House Labor Cases, Vol. 4, No. 60, 442, the Court had under consideration a case where the defendant operated a lumber business in connection with his retail grocery business. He owned a number of trucks and delivered lumber to purchasers in any amount. He sold 671,040 feet of lumber from Oct. 24, 1938 to May 31st, 1939. 43,004 feet of this was sold and shipped out of the State; the Court said:

> "I hold, as a conclusion of law, that the defendant, Stowers, was engaged in the retail lumber business alone, and that the plaintiff, Dotson was engaged in a retail and service establishment, the greater part of whose selling and servicing was in intrastate commerce. I hold that the defendant, Stowers, was not engaged in interstate commerce."

In the case of Earnest Ridley v. The General Cab Company of Nashville, Inc., Tennessee Chancery Court, decided February 10, 1942, reported in Commerce Clearing House Labor Cases, Vol. 5, No. 60, 951,

the Court had under consideration a cab company that derived the greater part of its revenue from its intrastate business, the Court said:

> "That as hereinbefore stated, the greater part of defendant's servicing is in intrastate commerce, therefore, under the provisions of Sec. 13(a) (2) of the Fair Labor Standards Act,, Sect. 6 of said Act does not apply to the complainant, and his bill must be dismissed."

In the case of Super-Cold Southwest Co. v. McBride, 124 Fed. (2nd) 90, at h.n. 2, the Court said:

> "A retail dealer, the greater part of whose selling is in intrastate commerce, is exempt from minimum and maximum hour provisions of Fair Labor Standards Act, notwithstanding that dealer's sales are made to commercial rather than to private users."

In the case of Walling, Adm'r. Wage and Hour Division, U.S. Dept. of Labor v. Wieman Co., 52 Fed. Supp. 131, the Court at h n. 6, said:—

> "Sixteen retail stores and general office and warehouse building all located within the state together constituted a single 'retail establishment' within exemption of Fair Labor Standards Act, and office employees who devoted more than 88% of their time to work incident to employer's retail functions were exempt from Wage and hour provisions of Act, though their work also involved the procuring of merchandise from outside the state."

In giving consideration to this particular discussion,

we should keep in mind the statement made by the Supreme Court of the United States in the case of Walling vs. Jacksonville Paper Company, 317 U.S. 564 at 571, (87 L. ed. 467) where it said:

> "It is quite clear that the exemption in Sect. 13(a) (2) was added to eliminate those retailers located near the state lines and making some interstate sales. 83 Cong. Rec. 75th Cong., 3d Sess. Pt. 7, pp. 7281, 7282, 7436, 7438."

* * * *

THAT, IF APPELLEE, WHO NEITHER MANUFACTURES NOR PRODUCES GOODS FOR COMMERCE, SHOULD BE HELD TO BE A WHOLESALER, THE APPELLANTS WOULD NOT BE ENTITLED TO INVOKE THE ACT FOR ALL OF THE SERVICES THEY RENDERED, BUT ONLY FOR THE SERVICES RENDERED BY THEM THAT HAD SOME IMMEDIATE RELATIONSHIP TO INTERSTATE COMMERCE.

"It should be noticed we are dealing here with one who neither manufactures nor produces goods for commerce. A producer under the Act is treated very differently from one who merely sells either at wholesale or retail. As to the manufacturer or producer Congress made no distinction as to the volume or amount or shipments in the commerce or of production for commerce by any particular shipper or producer, provided it was substantial."

(See opinion of Judge Lovett on page 40 of the record).

It should also be noticed that the Appellant, Harris,

drove the truck to South Carolina only one day a week, and that Appellant, McDaniel was a helper on the truck only that one day a week.

It should also be noticed that Appellee's records are so kept that every sale made in South Carolina can be identified. "My records are in such shape that I can identify every sale made in South Carolina and every one made by McKey." (See testimony of F. P. Bailey, page 29 brief of evidence).

* * * *

THAT THE BURDEN OF PROVING APPELLEE A WHOLESALER, AND THE BURDEN OF PROVING THE NUMBER OF HOURS APPELLANTS WERE ENGAGED IN INTERSTATE COMMERCE, RESTS UPON APPELLANTS.

> "An employer suing under the Fair Labor Standards Act has burden of showing by fair preponderance of evidence that he was while in the employ of the defendant employer engaged in commerce or in the production of goods for commerce."
>
> Muldowney v. Seaberg Elevator Co., Inc., 39 F. Supp. 275, h.n. (2).

In the case of Super-Cold Southwest Co. v. McBride, 124 Fed. 2d, 90, at head note 5, the Court said:

> "An employee suing under minimum wage provisions of Fair Labor Standards Act, and working in both interstate and intrastate commerce, must point out what part of his work was in intrastate and what part in interstate commerce."

In the case of White Motor Co. v. Littleton, already referred to in this brief, Judge Hutcheson specially concurred in the opinion, and at page 94, said:

> "In addition to the reason given in the opinion for reversing the judgment of the trial court, I think it clear that it must be reversed, because of the complete failure of the proof to show how much of the work done by plaintiff was in interstate and how much in intrastate commerce. There was some testimony that some of the plaintiffs did some work in 'commerce'. But it is clear that by far the greater part of the work done by them was not. An employee doing work both in inter- and intra- state commerce must point out, with sufficient definiteness to rest a finding on what part of his work was in interstate and what part in intrastate commerce."

The principle here contended for was declared in the case of Samuels v. Houston, 46 Federal Supplement, page 364, where the court, at page 367, said:

> "I conclude that the plaintiff has failed to carry the burden the law places on him of showing by a fair preponderance of the evidence that a substantial part of his work was in commerce or in producing goods for commerce, so as to be entitled to the benefits of the Act of Congress on which he relies."

In the case of Spier v. Gulf Coast Beverages, Inc., (D.C. S.D. Florida) 50 Fed. Supp. 653 at h.n. 2, the Court said:

> "Evidence regarding employees' interstate acti-

vity and amount of overtime, which consisted of speculation, guess and averages made up from recollections, did not warrant judgment for overtime compensation under the Fair Labor Standards Act of 1938, 29 U.S.C.A. Sect. 201 et. seq."

* * * *

EXAGERATED AND MISLEADING STATEMENTS MADE IN THE PETITION FOR CERTIORARI AND IN THE BRIEF FILED IN SUPPORT OF THE PETITION.

1. In paragraph Two of the petition for certiorari and in the brief filed in support thereof, petitioners attempt to mislead the Court into believing that respondent operated a Wholesale Grocery Business, because, on two occasions he applied for and secured a Wholesale License or Permit. The evidence showed, and Judge Lovett so found that,—"His business licenses from the State sometimes described him as a wholesale grocer and at other times simply as a grocer."

2. Again, in paragraph Two of the petition of certiorari and in the brief filed in support thereof, petitioners attempt to mislead the Court into believing that respondent conducted and operated other than the small establishment disclosed by the evidence, in that he used more than one truck.

Mr. Hammond testified that,—"I have only one truck." (R. 21). In this connection, Judge Lovett found as follows:—"However, defendant operates one truck of his own—and only one."

3. Again, in paragraph Two of the petition for certiorari and in the brief filed in support thereof, petition-

ers attempt to mislead the Court into believing that respondent advertised himself as a wholesale merchant in the Augusta City Directory and in the Augusta Telephone Directory, when, as a matter of fact, the evidence in the case showed that respondent did no advertising whatsoever, and that his place of business was simply classified in the two directories under Wholesale Grocers.

4. Again, in paragraph Two of the petition for certiorari, and in the brief filed in support thereof, petitioners attempt to mislead the Court into believing that respondent's only retail business was done in an office space measuring 35 x 40 feet, when, as a matter of fact, respondent had no office and the 35 x 50 feet referred to was the front part of respondent's store from which he conducted his retail business.

Mr. E. C. Hammond testified as follows:

> "I do some wholesale business, a small amount, solicit one day out of a week. I do not run a wholesale grocery store, never have. Only use that one day in the week to help with the buying. They just buy in little larger quantities and we furnish them; no wholesale business." (R. 20).
> "I have counters and shelves in my store and a cash register, and I ring up the cash sales. On the run of the day through the week I would say they would average 150. I would say 500 on Saturdays.***. I have no warehouse. Just a store that fronts right on Broad Street, it is probably 140 or 150 feet deep. That is all the place of business I have and all the merchandise I serve is in that place. I serve all the retail trade in that place, it

is about 30 or 40 feet wide, one story. It is occpied by a residence overhead and I occupy only one floor." (R. 21).

"As to the cash registers and counters I spoke of and how much space they took up, I would say 35 or 40 feet, the balance of it is for storage warehouse and feed. (R. 22).

"We don't do any advertising. As to the public knowing what kind of business I run, they see the stuff displayed all over the store, a pound of this and a pound of that and tobacco and the whole front of the store is made up of broken packages. The front of any wholesale business has to have an office**. We don't have an office***."

5. Again, in paragraph Two of the petition for certiorari, and in the brief filed in support thereof, petitioners attempt to mislead the court into believing that respondent has a very large business in that it extends through a city block, when, as a matter of fact, the evidence showed that the store did not extend through the block and that it was only 140 or 150 feet deep.

In this connection, Mr. Hammond testified that,—"My store and storage room do not run all the way from Broad Street through to Jones Street. There is a vacant lot in the back but no building between my store and Jones Street."

6. Again, in paragraph Two of the petition for certiorari, and in the brief filed in support thereof, petitioners attempt to mislead the Court into believing that respondent had at one time 153 wholesale customers, when, as a matter of fact, respondent never had at any

one time more than about 45 wholesale customers.

In this connection, Mr. McKey, one of the original plaintiffs, testified on cross-examination, that while he had testified on direct examination that the 153 retail merchants were active, he had gone to work for respondent in 1936 and what he meant was that sometime during the period throughout his entire employment, the 153 listed persons had been customers of respondent, but that a great many of them had ceased to do business with respondent in 1938. (R. 13).

Mr. Bailey, a witness for the respondent, testified that he had examined the list that Mr. McKey had testified to on direct examination and that there are more than 100 names that were on the books in 1937 and have long ago been discarded and we never see them any more, and they were not customers at all when the law went into effect in 1938, and that he had recently examined the books to see how many wholesale customers they had and that they only had 45 such cussomers. (R. 27).

7. Again, in paragraph Two of the petition for certiroari, petitioners complain that "during the trial of the case in the District Court and while petitioners were proceeding to prove by retail merchants, who were customers of the respondent, the volume of wholesale business done by respondent in commerce, his Honor, the District Judge, cut short petitioners' proof by ruling that he would limit such proof to three witnesses.

Petitioners say that they excepted to such ruling, but the record does not show that they did, but the record

does show that petitioners only offered two (2) witnesses for the purpose, Mr. Harbeson and Mr. Lively, so the ruling of the court could not have been harmful to petitioners.

8. Again, in paragraph Two of the certiorari, petitioners complain that during the trial, his Honor, the District Judge, elicited from respondent testimony that a Wage and Hour Inspector had examined his books and found.that he did less than 25% wholesale business.

The record does not show that petitioners moved for a mistrial on account of the Judge eliciting the testimony from the witness, nor does it show any other form of exception or objection.

CONCLUSION

In concluding this discussion, we respectfully submit that Judge Lovett, with all the facts before him, found as follows:

(a) "The plaintiffs were engaged in a retail establishment the greater part of whose selling was in interstate commerce."

(b) "By the express terms of section 13(a) (2) sections 6 and 7 of the Act are not applicable to the Plaintiffs."

The Circuit Court of Appeals on the original hearing of an Appeal, and again on re-hearing, approved these findings. There was ample evidence to support the

findings, and we submit that the petition for certiorari should be denied.

Respectfully submitted,

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